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Caught in the Toils of Regulation: Tahoe-Sierra, Ripeness, Permit Requirements, and a Measure of Relief

Adam Greenwood

CAUGHT IN THE TOILS OF REGULATION: *TAHOE-SIERRA*, RIPENESS, PERMIT REQUIREMENTS, AND A MEASURE OF RELIEF

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INTRODUCTION

Toils entangle and toils net. In Dante, we hear of the "inextricable toils of death."[1] *The First Skylark of Spring* heralds the "proud, unmanumitted soul" that fights the "toils of fate's control."[2] George Cabot Lodge speaks of "[t]he soul in the toils of the journeying worlds."[3] Less dramatically, in modern times landowners are caught in the toils of regulation. Regulatory toils are less sinister and inexorable than death, fate, or the motion of the worlds. Regulatory toils are nonetheless here to stay. Though these toils put a real burden on the property owner of complying with the rules, processes, and permit and variance schemes of multiple local, state, and federal agencies, the benefits to the public—and often to landowners themselves—are no less real. The question is not one of undoing regulation wholesale but of affording landowners various measure of relief. As land use regulation has grown, the need for this relief has also grown. In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*,[4] the Supreme Court found that the Takings Clause of the Constitution affords just such a measure of relief to landowners by requiring their compensation on a case-by-case basis if their land use is unduly delayed by a particularly onerous permit requirement.

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1 DANTE ALIGHIERI. *Purgatory*. THE DIVINE COMEDY. Canto XXVI, line 21 (The Harvard Classics ed., 1909).

2 William Watson, *The First Skylark of Spring*, *in* A VICTORIAN ANTHOLOGY, 1837–1895, *ll.* 21–24 (Edmund Clarence Stedman ed., 1895).

3 GEORGE CABOT LODGE, THE SONG OF THE WAVE, *l.* 44 (1970).

4 535 U.S. 302 (2002).

Like other areas of regulation,[5] land use regulation has expanded in the current era. In 1916 New York City enacted the first zoning ordinance;[6] city after city followed suit. Over time, local government land regulations primarily concerned with nuisance and public health became regulations at all government levels concerned with important public goods like green space, historic and aesthetic preservation, traffic, and quality of life,[7] along with environmental land regulations directed at preserving habitat, preserving biodiversity, and ending pollution. To take one example, in the 1970s the Endangered Species Act[8] took the unprecedented step of prohibiting land use that involved "significant habitat modification or degradation where it actually kills or injures wildlife."[9] In addition to the environment and other public goods, more doubtful goods like those of preserving property values or neighborhood exclusiveness also found their way into land use regulations.[10] For good and for occasional ill, the toils of land use regulation grew and continued to grow.

A good many land use regulations contained or came to contain permits, variances, and other procedures that allowed the regulator to flexibly adjust the regulation on a case-by-case basis. These adjustments allowed agencies to tailor regulations to the public good in specific situations and were often less harsh on landowners than blanket prohibitions. To continue the previous example, in 1982 Congress added permit language to the Endangered Species Act, allowing permits in cases of incidental habitat destruction, where the landowner did everything possible to reduce the harm and the Environmental

5 Crudely, but effectively, we are told that "The Federal Register, the annual compilation of new regulations, climbed from 12,000 pages in 1950 to 70,000 pages in 1993 and may reach 90,000 in 1995." H.R. REP. NO. 104-120, at 64 (1995), *cited in* William M. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 64 (2003). I have not been able to locate an equivalent statistical measure for land use regulation alone.

6 ANDERSON'S AMERICAN LAW OF ZONING § 3.07 (K. Young rev. 4th ed. 1996).

7 *See, e.g.*, John R. Nolon, *Golden and its Emanations: The Surprising Origins of Smart Growth*, 35 URB. LAW. 15, 16 (2003) (chronicling "three decades of experimentation and creativity responsible for a plethora of techniques now available to fight sprawl: the toolbox practitioners use to achieve smart growth at the local level").

8 Endangered Species Act of 1973 (ESA), Pub. L. No. 93-205, 87 Stat. 844 (codified at 16 U.S.C. §§ 1531–1544 (2000)).

9 Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 691 (1995) (accepting the Environmental Protection Agency's interpretation of 16 U.S.C. §§ 1532(19), 1536(a)(2) (2000)).

10 Henry A. Span, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1, 8–22 (2001) (describing how municipalities can use density restrictions, excess commercially and agriculturally zoned areas, and restrictions on multi-family housing to maintiain property values and keep out the poor).

Protection Agency (EPA) felt the endangered species was not at risk.[11] This permit flexibility allowed the EPA to better preserve endangered species in a number of cases. When a San Bruno Mountain development threatened the Mission Blue butterfly, for example, the EPA was able to grant a permit that committed the landowners to leaving four-fifths of the property in open space and to spending $60,000 a year on habitat improvement.[12] Permit and variance schemes gave governments and agencies the flexibility to fine tune regulations and enhance the public good while holding out some promise of relief to landowners.

This promise was not always met. Although they appeared to relax otherwise harsh regulations, permits and other escape hatches made harsh regulations possible, created unpredictability and uncertainty, gave government entities enormous power to string out and delay, gave these same entities the ability to extract conditions and concessions, and in all these things thereby shift the burden of achieving a public goal to a private person. Variances and permits fine tuned regulation at great private cost through repeated delays, repeated applications, and an enormous burden of fact development. Far from providing a measure of relief from the regulatory toils, permits and variances sometimes added to it.

The courts had already evolved a regulatory takings jurisprudence that compensated landowners when the costs of the regulatory toils grew too great. A similar approach to permit requirements that provided compensation in the worst cases of private landowner burden would similarly appear to ease the burden on landowners without undoing the public good that permit requirements serve. Happily, permits and variance already fit well into the regulatory takings framework—one needed only conceive of the permit requirement as a regulation temporarily "taking" the right to use the land in a particular way, ending at the date of the granting of the permit.

Nonetheless, four legal obstacles stood in the way of this happy resolution. First, the courts had to recognize that a temporary regulatory taking could be a taking. Second, the courts had to recognize that permits and variances were in themselves regulations on land use. Third, the courts had to overcome artificial ripeness barriers that prevented litigation until agencies had made a formal "final decision," a decision that often never came. The courts did indeed overcome these obstacles and this Note will limn how it was done. Fourth, the courts had to overcome artificial ripeness rules which held that a tak-

11 ESA § 10, 16 U.S.C. §1539.

12 *See* Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 980 (1985).

ings challenge to a permit requirement could never be ripe if a permit had been granted. The Supreme Court overcame this fourth barrier in *Tahoe-Sierra* and affirmed with an unprecedented clarity that permit requirements could be regulatory takings. Although landowners will still not always, or even usually, prevail on their takings claims, *Tahoe-Sierra* removes the barriers that threw out most claims on summary judgment. Claims can now go to trial and sometimes prevail. The Constitution has afforded a measure of relief to those who find themselves caught in the toils of permit regulation.

Part I of this Note will lay out general regulatory takings principles. Part II will discuss the first two obstacles to treating permit requirements as potential regulatory takings and the clearing of these obstacles. Part III will explore the unique ripeness jurisprudence appropriate to regulatory takings. Part IV will discuss the third obstacle, created by that jurisprudence—the formal "final decision" rule—before explaining how that obstacle was overcome. Part V will consider in depth the fourth obstacle, also created by that unique ripeness jurisprudence: a substantive ripeness rule that a permit requirement could never be a taking. In turn, Part VI will come to *Tahoe-Sierra*, which removed all basis for that fourth obstacle and ultimately stated clearly what before had only been implied: that permit requirements and other planning devices could be regulatory takings.

I. THE GENERAL FRAMEWORK OF REGULATORY TAKINGS

As regulations grew, the Supreme Court started to treat the occasional land use regulation as a possible taking. Although the regulatory takings doctrine was never so severe as to actually hinder regulation, it did provide a measure of relief.

Justice Holmes wrote the first opinion that treated a regulation, as opposed to outright physical occupation or ouster, as a taking.[13] The opinion involved the Pennsylvania Coal Company, which had specifically reserved the support rights in its sale of several surface properties, allowing the company to mine even the coal that kept the surface from subsiding. A Pennsylvania act later prohibited using support rights in ways that subsided the surface underneath a dwelling, and the surface owners sued for injunctive relief.[14]

Justice Holmes, writing for the eight to one majority, held that some regulations could so impede property rights that they constituted a taking. The opinion set up several key concepts. First, it held that not all regulation of property rights constituted a taking, saying

13 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

14 *Id.* at 412–13.

that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[15] Second, as already stated, the opinion held that a regulation could effect a taking if the "regulation goes too far."[16] Finally, Holmes stated that an "an average reciprocity of advantage" might excuse an otherwise overreaching regulation.[17] The first two principles seemed to set up a balancing test, although what was to be balanced remained unclear. The third seemed to suggest that regulations only infringed property rights in the case of some mismatch between the bearer of the burden and the object of the benefit.

While these key concepts cried out for further elaboration, they did not conceptually differentiate permits and other planning regulations from the general run of land use restrictions. Some permits could conceivably impose such severe burdens on property owners, while benefiting parties other than the burdened owners, that a taking might occur. Permit requirements seemed weighable in the same balancing test as other regulations, whatever that balancing test may have been. Even so, the Supreme Court had not explicitly addressed permit requirements as regulatory takings.

In the immediately subsequent decades the Court was not able to clarify the implied balancing test of regulatory takings. The Court admitted that "whether a particular government restriction amounted to a constitutional taking . . . turn[ed] upon the particular circumstances of each case."[18] The Court did take one important doctrinal step. It explained the rationale behind takings jurisprudence: it "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[19] This rationale did not appear to exclude permit regulations. Some permit requirements, at least, could shift public burdens to private parties. For example, consider provisions of the Endangered Species Act referred to in the Introduction. Landowners are prevented from certain land uses that harm species until they agree to alter their land use in a way that moderates the harm, and until they help develop the factual record on the extent and location of the endangered species and the way it will suffer from the proposed land uses.[20] The resulting biodiversity benefits us all. The delay and information costs burden only the landowner.

15 *Id.* at 413.
16 *Id.* at 415.
17 *Id.*
18 United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958).
19 Armstrong v. United States, 364 U.S. 40, 49 (1960).
20 *See supra* notes 8–9, 11.

The modern era of regulatory takings law began in 1978 with *Penn Central Transportation Co. v. City of New York.*[21] *Penn Central* involved a suit between the owners of the historic Grand Central Station and the City of New York. The owners planned to add an edifice to the existing structure, and the city prohibited the contemplated use on preservation grounds.[22] Justice Brennan, writing for the Court, found that the prohibition on new construction had not gone too far.[23]

Penn Central mattered and matters because it suggested some discrete factors that go into the balancing test implied in *Pennsylvania Coal.* It identified as one factor the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct *investment-backed expectations.*"[24] In an apparent restatement of this factor, the court referred to "interests that were sufficiently bound up with the *reasonable expectations* of the claimant to constitute 'property' for Fifth Amendment purposes."[25] As another factor, the opinion identified "the character of the governmental action,"[26] apparently including the extent to which "health, safety, morals, or general welfare"[27] were involved in the government action. The Court emphasized that it was engaged in "essentially ad hoc, factual inquiries."[28]

Of these factors, the most significant is probably that of "investment-backed expectations." "Investment-backed expectations," or its equivalent, "reasonable expectations," may refer to a famous article by Frank Michelman that urged redefining regulatory takings along similar lines for utilitarian reasons.[29] In the alternative, it may refer to a book by Bruce Ackerman, published the year before the decision,

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21 438 U.S. 104 (1978).

22 *See id.* at 108–19.

23 *Id.* at 138.

24 *Id.* at 124 (emphasis added).

25 *Id.* at 125 (emphasis added).

26 *Id.* at 124.

27 *Id.* at 125 (citing Nectow v. Cambridge, 277 U.S. 183, 188 (1928)).

28 *Id.* at 124.

29 *See, e.g.*, Carol Necole Brown, *Taking the Takings Claim: A Policy and Economic Analysis of the Survival of Takings Claims After Property Transfers*, 36 CONN. L. REV. 7, 21 n.87 (2003) ("Professor Frank I. Michelman is widely credited with first articulating the concept of 'investment-backed expectations.'"). In his famous article *Property, Utility, and Fairness,* Michelman refers to reasonable expectations numerous times. *See, e.g.*, Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1212 (1967). He does so because, in his utilitarian approach, the more a land use is part of an owner's expectations for the land, the greater the social costs of taking it away from him. *Id.* at 1231.

which advocated rethinking takings law in the light of a layman's (and ordinary observer's) understanding of what constitutes property.[30] Neither author distinguished between permits and other land use regulations.

Neither did the *Penn Central* decision itself. And while the *Penn Central* factors have resisted further definition, the case has captured the judicial imagination to such an extent that the regulatory takings balancing test is usually called the *Penn Central* test, although sometimes it is referred to as the ad hoc test because of its uncertainties.[31]

The *Penn Central* test has received little elaboration since the decision itself. The Supreme Court reaffirmed recently that the *Penn Central* test is still an "ad hoc, factual inquir[y]"[32] that allows the "weighing of all the relevant circumstances."[33] What elaboration it has received has done nothing to exclude permits. For example, in *Lucas v. South Carolina Coastal Council*,[34] the Supreme Court clarified that a complete and permanent ban on property use would always effect a regulatory taking.[35] This became known as the categorical or per se test.[36] *Lucas* had no effect on permits and other less-than-complete takings, leaving them to the *Penn Central* test.

The *Penn Central* test, then, is still the mainstay of our regulatory takings jurisprudence. It conceptually applies to permit regulations as well as other types. The balancing factors of investment-backed expectations and of the governmental interest are both affected even by a mere requirement that a landowner seek a permit. The delay and expense occasioned by permit-seeking might interfere with the value of a property, and the clear purposes for which the landowner has bought it. Alternatively, if the governmental interest in requiring the permit-seeking is slight, but the burden of getting the permit is high, perhaps a taking might lie. Most permit requirements probably would not constitute a taking in the end—as indeed most other land use

30 *See generally* BRUCE ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977).

31 *See, e.g.*, Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697 (1988).

32 Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 322 (2002) (citing *Penn Central*, 438 U.S. at 124).

33 *Id.* (citing Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)).

34 505 U.S. 1003 (1992).

35 "[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 1019.

36 *Tahoe-Sierra*, 535 U.S. at 325.

regulations do not in the end[37]—but the *Penn Central* test does not appear to exclude them ex ante. An ad hoc inquiry into land regulation is, by nature, fact-specific. It does not lend itself to the categorical exclusion of any one class of land use regulation. The general principles of *Penn Central* should apply to permit requirements just as much as to other land use regulations.

Still, applicability of general principles is not the same as cases specifically addressing permit requirements as potential takings. Even given *Penn Central*, the courts could have evolved a formal or even arbitrary distinction between permit requirements and other land use regulations. In fact, the Court had to overcome several such formalizing and arbitrary tendencies among the lower courts.

Its own early decision, *Agins v. Tiburon*,[38] was unintentionally one source of such formalizing tendencies. *Agins* in part involved landowners who had held off on a development while the City of Tiburon tried to condemn their property. The city later dropped its efforts to condemn, but by then the development value had dropped considerably. The landowners sued for a taking. The Court noted that "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.'"[39] This passage is best read, emphasizing the phrase "fluctuations in value," to indicate that changes in property value are not equivalent to prohibitions of property use. While the government must sometimes pay for the value of property uses that it takes to itself, and if the taking is temporary then the rental value, it does not have to pay for swings in the market, no more than a tenant has to compensate his landlord if property values drop during his lease. This interpretation of *Agins* is the best interpretation, but is not the only one; some took the Court to mean that "governmental decisionmaking" cast a protective sphere over land use regulations in aid of that decisionmaking, i.e., permit requirements.[40]

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37 *See, e.g.*, David F. Coursen, *The Takings Jurisprudence of the Court of Federal Claims and the Federal Circuit*, 29 ENVTL. L. 821, 823 (1999) (noting that "the Court . . . has generally rejected the takings claim" when using the *Penn Central* test); Alexander Volokh, Comment, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, *122 S. Ct. 1465 (2002)*, 116 HARV. L. REV. 321, 331 (2002) (". . . *Penn Central* is unsympathetic to landowner claimants.").

38 447 U.S. 255 (1980).

39 *Id.* at 263 n.9 (quoting Danforth v. United States, 308 U.S. 271, 285 (1939)) (upholding a pre-condemnation valuation agreed to by Danforth and the United States in anticipation of condemnation instead of the lower actual value of the land at the time of condemnation).

40 *See infra* Part V.B.

The landowners in *Agins* also claimed a taking based on new zoning the city put in place when it dropped its condemnation suit. As the zoning regulations still permitted the landowners to build up to five houses, the Court rejected this claim: land use regulations "took," the Court said, if they "denie[d] an owner economically viable use of his land."[41] That language had two possible meanings. In the first, a regulation *automatically* became a taking if it denied *all* economic use. Because of some ripeness concerns the *Agins* Court raised,[42] this first meaning is probably the best. The second meaning, by no means implausible, is that a regulation *only* became a taking if it denied all economic use. This second meaning would surely exclude permit requirements from takings since future economic uses are still uses. By suggesting that a partial regulation of land use would not constitute a regulatory taking, *Agins* implied that a temporary regulation of land use (by definition partial), and therefore permit requirements, could not be regulatory takings. *Agins* raised questions about temporary land use regulation, and about the special status of decisionmaking processes, that regulatory takings jurisprudence would have to answer before that jurisprudence could apply to permits.

Agins was not the only sources of obstacles to the application of regulatory takings jurisprudence to permit requirements. In addition, some lower courts misunderstood the Supreme Court ripeness rules for regulatory takings. First, these courts reconceived the "final decision" requirements of ripeness as a formal rule.[43] This meant that governments and agencies could avoid any takings consideration of their permit requirements if they kept postponing a "final decision" by repeatedly asking for new permit applications. Second, some lower courts interpreted ripeness as a substantive rule of decision that somehow barred any claims involving granted permits. Agencies and governments could avoid any takings consideration of their permit requirements by granting a permit. Regulatory takings jurisprudence would have to overturn these mistakes before it could afford landowners a measure of relief from permit requirements.

II. Temporary Takings and Permits as Potential Takings

In subsequent decisions, the Supreme Court began to clarify the role of permits in regulatory takings. The decisions established that a temporary ban on use could indeed be a taking. By treating some disproportionate exactions on which permits were conditioned as tak-

41 *Agins*, 447 U.S. at 260.

42 *See infra* notes 75–77 and accompanying text.

43 *See infra* Part IV.A.

ings, the Supreme Court also moved toward affirming the view that permits were as much regulations as any other land use restriction and did not have some special decisionmaking or process status.

A. *Temporary Takings*

For a time after *Penn Central*, the Supreme Court had yet to recognize a temporary use restriction as a taking, let alone a permit. The court's balancing test—public interest versus private burden—appeared to include temporary restrictions as well as permanent ones, but some judicial authority had to pull the trigger. Until then, agencies could evade takings challenges by repealing the restriction, making it temporary. Consequently, plaintiffs could not seek compensation for a granted permit, no matter the delay, expense, and conditions attached to it, because the granting of the permit made the regulation temporary.

Then, in a 1987 case, the Supreme Court first ruled that temporary use regulations could be regulatory takings. Although *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*[44] specifically put permits and other planning delays to one side,[45] the Court's reasoning cleared the way for permit requirements to present valid takings claims, analyzed under *Penn Central*.

In *First English*, the plaintiff Lutheran church owned a camp destroyed by flood. The County of Los Angeles responded to the flood by forbidding any new construction or any reconstruction in a flood protection area defined to include the camp.[46] When the church claimed a taking, the county maintained the ordinance pending the results of state litigation; when California courts ruled for the church, the county withdrew the restrictive ordinance. The California courts then ruled that the taking had vanished: the county had to pay compensation only if it chose to maintain the restriction after the matter had worked its way through the courts, on the grounds that a government should never have to pay compensation unless it voluntarily chose to continue a regulation while understanding that compensation would lie.[47] The Supreme Court thus faced the following issue: may a landowner collect damages for regulatory deprivations that happened before a final court ruling certifying that the regulation was indeed a taking?[48] As the regulatory body had withdrawn the regula-

44 482 U.S. 304 (1987).
45 *See id.* at 321.
46 *Id.* at 307.
47 *Id.* at 308–10.
48 *See id.* at 306–07.

tion as soon as it was deemed a taking, the Court presented the question this way: can the Takings Clause sometimes require compensation for mere "'temporary' regulatory takings?"[49]

The Court concluded that temporary deprivations could in fact be takings, depending on the outcome of the *Penn Central* analysis, and that temporariness did not per se preclude a taking. As the Court stated, "'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings."[50] In addition, the Court made clear that nothing distinguished pre-trial usage bans from those that occurred post-trial. The county's desire to receive a court ruling before lifting the ban was no different from the other legitimate government motives that could also effect takings under *Penn Central*, as the Court noted: "We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[51] Regulations on land use were still potentially takings under *Penn Central*, regardless whether they were temporary, and whether they were tied up in a judicial proceeding.

Although *First English* was not about a permit or other temporary planning ban, its ruling and reasoning broke down important barriers. Temporariness mattered because permits always temporarily deprive owners of some land use. The refusal to let the county "lift" the taking mattered because agencies "lift" permit deprivations by granting permits. Such lifting does not, of course, change the reality of past prohibitions. The Court's indifference to the presence of an ongoing judicial process during the time of the temporary ban mattered because permit regulations temporarily ban uses precisely to facilitate the ongoing quasi-judicial process that leads to permit approval. Indeed, if the analogies were not so close, the Court would not have had to exempt permits from the scope of the ruling. The stage was set for the first forays into permit requirements and then *Tahoe-Sierra*'s definitive ruling.

B. Permit Exactions as Takings

The first actual foray into permit requirements occurred the same year as *First English*. *Nollan v. California Coastal Commission*[52] involved a permit to build a beach house. The Commission granted the

49 *Id.* at 313.
50 *Id.* at 318.
51 *Id.* at 321.
52 483 U.S. 825 (1987).

permit, or would have if the Nollans had acquiesced in granting an easement to the public to cross their beach.[53] The Court ignored any uncertainties about permits as takings. Instead, the Court granted the Nollans compensation in the event the Commission continued to insist on an easement.[54] Why? Because the condition on the permit—the easement—was not sufficiently related to the original purpose of the regulation that restricted building. In the Court's language, it lacked a "nexus" and therefore was a regulatory taking.[55]

Crucially, the *Nollan* Court decided to characterize the exaction as a taking and not as a due process violation.[56] Here was the first hint that the Constitution would reject a conception of permits that would treat them as mere procedures and not as land use regulations.

In *Dolan v. City of Tigard*,[57] the Supreme Court again refused to throw out a case on the grounds that a permit had been granted or the challenged land use regulation was part and parcel of the decisionmaking process. Florence Dolan, an electric supplies and plumbing vendor, applied to the city of Tigard for a permit to rebuild her facility. They granted it, on condition she set aside some green space for flood control (she planned to pave more parking lot) and land for a bike path (her larger facility would attract more customers).[58] Although Ms. Dolan received a permit, she did not much like these conditions on it, so she took to the courts and made it all the way to the top.

The Supreme Court found that the city of Tigard was not simply trying to "obtain an easement through gimmickry,"[59] as the California Coastal Commission had. Instead, the city had simply not tailored

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53 *Id.* at 828.

54 *Id.* at 841–42.

55 *Id.* at 837.

56 *Id.* at 834 n.3. Note that Justice Brennan dissented because he preferred a due process analysis. *Id.* at 843 n.1 (Brennan, J., dissenting). *Nollan* is another example of the odd interaction between the Due Process Clause and the Takings Clause, although *Nollan* rejects an attempt to conflate the two. Although much can and will be said about this interaction, *see* Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977 (2000); John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of Doctrinal Confusion*, 17 VT. L. REV. 695 (1993); Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713 (2002); Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379, it is not the subject of this Note. It suffices that *Nollan* chose to treat the exaction as a takings violation.

57 512 U.S. 374 (1994)

58 *Id.* at 379–80.

59 *Id.* at 387.

their request to fit the damage Ms. Dolan's new store might cause. The conditions did not seem to be in "rough proportionality" to the needs that had inspired the permit regulations in the first place.[60] The Supreme Court remanded, with the instruction that the city of Tigard must prove rough proportionality or compensate Ms. Dolan.[61]

Dolan, which extends *Nollan*, bears the same relation to permits and takings as does the latter case. It shows that granted permits ought not per se exclude owners from the courts, and, by holding that conditions not in "rough proportionality" are per se compensable, leaves room for the more ordinary delays and conditions associated with permits to be considered under the ad hoc *Penn Central* test. The *Nollan/Dolan* per se rule, let it be noted, also directly undermines lower court cases barring permit requirements on ripeness grounds.[62] While this Note argues, and *Tahoe-Sierra* confirms, that the ordinary delays inherent in a permit scheme are potential takings under *Penn Central*, these lower court cases refuse to hear *Penn Central* permit claims except in cases of "extraordinary delay."[63] These cases define "extraordinary delay" as that delay exceeding what is justified by the purposes of the regulatory scheme.[64] But, *Nollan* and *Dolan* in a sense hold that permit requirement burdens not justified by the government's purposes are *always* takings. The lower court cases, on the other hand, grudgingly treat these extra costs only as potential takings under a *Penn Central* test, and refuse to consider any other costs at all. The *Nollan* and *Dolan* framework set the stage for evaluating ordinary permit requirements under the *Penn Central* test.

III. Ripeness and Regulatory Takings

This Note has detailed the slow movement of the Supreme Court toward treating permits as potential regulatory takings. This movement would excite no remark—permits would not separate themselves from other sorts of regulations—were it not for two factors. First, until *First English* the possibility was still open of a formal distinction between permanent land use regulations and temporary ones, and until *Nollan* and *Dolan* the possibility was still open that permit requirements had a special status as part of a decisionmaking process. Second, a unique ripeness jurisprudence, involving permits, had

60 *Id.* at 391.

61 *Id.* at 395.

62 These cases are discussed *infra* Part V.B.

63 *See infra* note 126–27 and accompanying text.

64 *See* Wyatt v. United States, 271 F.3d 1090, 1098 (Fed. Cir. 2001).

grown up for regulatory takings. This jurisprudence created some confusion about the status of permits as takings claims.

A. General Ripeness Doctrine

Ripeness doctrine concerns "whether [a] case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all."[65] The ripeness doctrine arose from a blend of prudential and constitutional concerns. Prudentially, courts wished to make decisions based on a fully developed factual record, not on hypothetical or speculative facts. Constitutionally, federal courts could not issue advisory opinions[66]—statements of law not tied to any concrete "case or controversy."[67]

The ripeness doctrine came into its strength in the area of administrative law, agencies, and regulations, especially where the agency has a procedure, such as a permit, that allows the agency to individualize the application of a regulation. Courts will often refuse to hear challenges to regulations until the parties have settled on the individual application. Ripeness in regulatory disputes wards the courts against "entangling themselves in abstract disagreements over administrative policies."[68] It also "protect[s] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."[69] In essence, the courts will not allow wholesale challenges to regulations unless the challengers have taken advantage of any permits, variances, administrative reviews, or other devices that might change the way the regulation applies.[70] Ripeness allows the courts to steer clear of the fighting until they can tell what the fighting is about.

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65 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3532, at 112 (1984); *see also* Marla E. Mansfield, *Standing and Ripeness Revisited: The Supreme Court's "Hypothetical" Barriers*, 68 N.D. L. Rev. 1, 68 (1992) ("most courts would rather avoid speculative cases, defer to finders of fact with greater subject matter expertise, decide cases with fully-developed records, and avoid overly broad opinions, even if these courts might constitutionally hear a dispute."), Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 11 (1995); Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 178 (1987) (stating that "ripeness . . . allows courts to postpone interfering when necessary so that other branches of government . . . may perform their functions unimpeded").

66 *See* RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 92–95 (4th ed. 1996).

67 *See* U.S. CONST. art. III, § 2.

68 Abbott Laboratories v. Gardner, 387 U.S. 136, 148–49 (1967), *rev'd on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977).

69 *Id.*

70 13A WRIGHT ET AL., *supra* note 65, § 3532.6, at 193–95.

As regulatory takings claims by definition involve regulations, ripeness doctrine would seem to come into play in some form. And because the *Penn Central* test is so fact-specific, ripeness would seem even more crucial to ward off claims until landowners and agencies had reached some sort of final agreement. Ripeness would thus appear to require that a landowner not challenge a regulation until the landowner had tried his hand at obtaining a permit. If the permit was granted, some prohibitions on land use would end and the facts of the claim would differ. Likewise, if a landowner wished to challenge the permit requirement itself—the mere refusal to allow property use without permission—the landowner would still have to seek a permit. Until the permit was granted, the courts would not otherwise know what delay and land use conditions the permit requirement imposed on that particular landowner's use of the property.

B. The Unique Regulatory Takings Ripeness Doctrine

The application of ripeness concerns in regulatory takings was no less obvious to the Supreme Court. An off-hand reference in *Penn Central* first indicated the potential intersection of permits, ripeness, and regulatory takings. The New York City law in question allowed exceptions to the development ban upon obtaining a "certificate," essentially a permit.[71] The Penn Central Company had applied for an ambitious certificate, and been denied.[72] As a side note, the Supreme Court noted that the applicants could have submitted a more reasonable development request, but did not.[73] Many have seen this statement as the first suggestion of the peculiar importance ripeness concerns would come to have in the regulatory takings area—that is, the first suggestion of the importance of ripeness in takings challenges to regulations that contained permit provisions or other possible waivers.[74]

Ripeness in regulatory takings cases soon developed beyond the fleeting reference in *Penn Central.* The first significant ripeness discussion occurred in *Agins v. City of Tiburon.*[75] In that case, the landown-

71 Penn Central Transp. Co. v. New York, 438 U.S. 104, 112 (1978).

72 *Id.* at 116–17.

73 *Id.* at 118–19 ("[A]ppellants did not avail themselves of the opportunity to develop and submit other plans for the Commission's consideration and approval."); *id.* at 137 n.34 ("Counsel for appellants admitted at oral argument that the Commission has not suggested that it would not, for example, approve a 20-story office tower along the lines of that which was part of the original plan for the Terminal.").

74 *See, e.g.*, Patrick W. Maraist, *A Statutory Beacon in the Land Use Ripeness Maze: The Florida Private Property Rights Protection Act*, 47 FLA. L. REV. 411, 422 (1995).

75 447 U.S. 255 (1980).

ers purchased a five-acre lot. Subsequently, Tiburon imposed zoning restrictions that would have permitted, if permission was applied for, one to five single-family homes. Instead of applying for approval, the landowners claimed a regulatory taking, but the court rejected their claim on grounds of unripeness, among others.[76] Because the landowners had failed to seek a permit and thereby develop a specific record, the Supreme Court only considered whether the mere enactment of a zoning regulation worked a taking.[77] The presence of a permit requirement in the case proved significant.

Above all, *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*[78] crystallized ripeness as a unique takings concern. After Hamilton Bank foreclosed on an undeveloped plot in Williamson County, Tennessee, it submitted a proposed subdivision for county permit approval. A similar proposal for the land had already received approval under prior zoning regulations. The county disapproved this proposal, citing excess density and other factors,[79] and the bank sued. Although the Supreme Court eventually granted certiorari, it dismissed the bank's claim. The Court ruled that landowners must seek permits or variances or waivers before their takings claim could ripen. It stated that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."[80] The Court held that, even though the county had turned down the proposed subdivision, the takings claim was not ripe because Hamilton Bank had not availed themselves of the variance procedure, in addition to their permit application.[81] In addition, the Court seemed to hold that landowners must first seek compensation in the state courts.[82] As in general regulatory ripeness cases, landowners had to seek a final decision. Regulatory takings seemed to add the additional wrinkle that a final decision might require multiple efforts. In any takings claim against a permit regulation, ripeness would now be a central dispute.

Later cases fleshed out the rationale for regulatory takings ripeness. *MacDonald, Sommer & Frates v. Yolo County*,[83] like *Williamson*

76 *Id.* at 260.
77 *Id.*
78 473 U.S. 172 (1985).
79 *Id.* at 181–82.
80 *Id.* at 186–87.
81 *Id.* at 187–94.
82 *Id.* at 194.
83 477 U.S. 340 (1986).

County, involved frustrated developers whose proposed subdivision had been denied. As in *Williamson County*, the Court turned down the developers' claim because it thought that the county might have permitted some other form of use. Thus, no final decision had been reached. In applying the *Williamson County* rule to reach the *Williamson County* result, the Supreme Court explained the rationale for that rule: an "essential prerequisite to [asserting a regulatory takings claim] is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."[84]

In other words, the takings ripeness rationale is that of the ripeness doctrine at large. The court cannot reasonably balance the public interest against the private harm until it knows exactly the extent of the private harm. As one would expect, ripeness allows the court to know exactly what is at stake in each in case.

IV. THE FIRST ABUSE OF REGULATORY TAKINGS RIPENESS: THE "FINAL DECISION" RULE

Regrettably, the principle of regulatory takings ripeness has done more than clarify the private harm—it has reduced property owners' ability to escape from the toils of regulation. The multiple permit attempts required to reach a final decision, and the further requirement of bringing suit in the state courts first, heavily burden landowners.

A. The Formal "Final Decision" Rule

Compounding the problem, lower federal courts often treated the final decision requirement as a formal and not a functional requirement. Even in cases where an agency repeatedly denied various requests, courts formalistically refused to consider claims if the agency held out hope for next time.[85]

Some commentators even suggest that the Supreme Court itself initially applied the final decision requirement formalistically.[86] In any case, most regulated landowners faced a situation where they would have to pass through unending decisionmaking procedures in

84 *Id.* at 348.

85 *See* John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform so Takings Plaintiffs Can Enter the Federal Courthouse*, 31 URB. LAW. 195, 202–36 (1999) (collecting cases). *But see* R. Jeffrey Lyman, *Finality Ripeness in Federal Land Use Cases from* Hamilton Bank *to* Lucas, 9 J. LAND USE & ENVTL. L. 101 (1993).

86 *See* Stein, *supra* note 65, at 14–27.

order to get a ripe claim. And even good faith efforts to abide by the formal ripeness requirements were often unavailing because the mandatory trip through the state courts precluded a federal claim.[87]

City of Monterey v. Del Monte Dunes at Monterey, Ltd.,[88] illustrates the pernicious way that these formalistic ripeness requirements acted to worsen the state of landowners caught in the regulatory toils, instead of affording them a measure of relief. In 1981 Del Monte Dunes submitted a modest development proposal, some 344 houses for an area zoned for up to 1000.[89] Monterey's planning board denied approval but suggested that a 264 house development would receive it. Del Monte Dunes applied for a 264 house development; the planning board denied approval but suggested 224. Del Monte Dunes applied again for the lower amount and the planning board again denied approval, suggesting a lower amount. Formally speaking, Del Monte Dunes did not have a ripe claim because it did not yet have a final rejection. Del Monte Dunes then appealed to the city council, which suggested a 190 unit development, but the planning commission again denied a permit. Del Monte Dunes again appealed to the city council, which demanded a list of exactions and concessions. Del Monte Dunes complied and made another application. At least one body approved—the architecture commission—but the planning commission still denied a permit. At the same time another agency declared a sewer moratorium that applied to all new development. The city council refused any further help to Del Monte Dunes at this point. When Del Monte Dunes finally sued for compensation, the district court rejected the suit as unripe, because Del Monte Dunes had not yet received "a definitive decision as to the development the city would allow."[90] The district court's action was typical of those lower courts that treated the final decision requirement as a formal rule.

B. The Demise of the Formal "Final Decision" Rule

Although the lower courts have not always been quick to respond,[91] subsequent Supreme Court cases, returning to the purposes of takings ripeness, made it clear that variances, permits, and other devices were only required for ripeness if they had some chance of

87 Michael M. Berger, *Supreme Bait and Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U. J.L. & POL'Y 99, 105–20 (2000); Delaney & Desiderio, *supra* note 85, at 195, 202–32 (1999).

88 526 U.S. 687 (1999).

89 *See id.* at 695–98.

90 *Id.* at 698.

91 *See* Delaney and Desiderio, *supra* note 85.

being granted. As the Court said in 1997, a suit could proceed even without a "final decision": "[b]ecause the agency has no discretion to exercise. . . . no occasion exists for applying [the] requirement that a landowner take steps to obtain a final decision."[92] *Lucas v. South Carolina Coastal Council* is another recent instance where the Court let an individual sue without formally seeking a variance or a final decision, in this case because the original regulation admitted no exceptions.[93] *Lucas* also allowed the landowner to continue with his claim even though the South Carolina legislature had added a permit procedure in the middle of the litigation.[94] Both of these rulings indicated that ripeness in regulatory takings was meant only to clarify the application of a regulation. It was not meant as a formal barrier to litigation.

In *Palazzolo v. Rhode Island*,[95] decided recently, the Court addressed itself almost entirely to the issue of ripeness and finality. Mr. Palazzolo owned eighteen acres of coastal wetlands, which he wished to fill in and start developing. When Rhode Island Coastal Resources Management Council turned down both his requests, he sued, claiming a regulatory taking.[96] The Court first dismissed the claim that the alleged takings was unripe because other regulatory agencies had also imposed permit requirements on Palazzolo's land, and Palazzolo had not sought permits from those agencies after the Council turned him down.[97] It then addressed the assertion that the central claim was unripe, as Palazzolo had not yet exhausted his possibilities of permits, variances, exceptions, or other devices. The Supreme Court affirmed that "[w]hile a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened."[98] Although Palazzolo had only filed two applications, both of them for optimistic amounts of development,[99] the agency had rejected his applications on the grounds

92 Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 739 (1997).

93 Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1008–09, 1012–13 (1992).

94 *Id.* at 1010–11; Stein, *supra* note 65, at 24.

95 Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

96 *Id.* at 606.

97 *Id.* at 624. Apparently Mr. Palazzolo would have needed a zoning variance from the city of Waverly and a sewage permit from the Rhode Island Department of Environmental Management even if the Council had approved his application to fill in the wetlands. *Id.*

98 *Id.* at 620.

99 *Id.* at 614–15.

that they did not serve a "compelling public purpose."[100] The Supreme Court felt a reasonable certainty that Palazzolo would never reach this standard, no matter how many permits he requested or variances he sought.[101] The Court ended with *MacDonald*'s classic explanation of the takings ripeness doctrine: "[a] court cannot determine whether a regulation goes 'too far' unless it knows how far the regulation goes."[102] The Court then immediately added that "[r]ipeness doctrine does not require a landowner to submit applications for their own sake."[103] In explicit terms *Palazzolo* put an end to any idea that the "final decision" rule is a formal rule. Instead, *Palazzolo* reaffirmed ripeness in regulatory takings as a functional doctrine.[104]

Palazzolo and other decisions made it clear that regulatory takings ripeness is not a formal doctrine requiring a completed attempt to get a permit or a waiver in every case. Rather, in most cases the landowner must seek a permit or a variance because only once the permit is granted or denied can one know the extent of the regulation. The ripeness doctrine question exists to give courts something to judge: What has been taken? What exactly does the regulation deny? Especially now that recent decisions have corrected some of the abuses of the ripeness doctrine, this prudence and discretion can only be applauded. This solid, practical doctrine gives the court the case-specific facts that *Penn Central* requires.

V. THE FOURTH OBSTACLE: RIPENESS AS A FORMAL RULE FORBIDDING CONSIDERATION OF CLAIMS AGAINST PERMIT REQUIREMENTS

In addition to making the final decision requirement a formal requirement, some courts have unfortunately viewed the ripeness doctrine as a rule of decision rather than as a rule for fact development, at least when it comes to permit requirements. These courts have held that granting a permit wipes away not only some sorts of takings claims but all possible takings claims. Thus, if after a long process the landowner successfully gets a permit, these courts think that the landowner is per se denied any takings claim against regulation requiring him to undergo a lengthy approval process.

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100 *Id.* at 615.

101 *Id.* at 620.

102 *Id.* at 622 (citing MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348 (1986)).

103 *Id.*

104 For an excellent discussion, see William M. Hof, Note, *Trying to Halt the Procedural Merry-Go-Round: The Ripeness of Regulatory Takings After* Palazzolo v. Rhode Island, 46 ST. LOUIS U. L.J. 833 (2002).

The error is natural enough: landowners frequently attack regulations as soon as they are imposed. The courts tell them that they cannot do so until they've applied for a permit and have had it denied. The natural, unthinking assumption is that a permit must be denied before any takings claim is ripe. In reality, the granted permit marks the end of a temporary ban of some or all land use and thus ripens a temporary takings claim, distinct from a claim against the regulation as a whole.

A. Riverside Bayview

Those decisions that do see a denied permit as a formal rule of ripeness almost all trace back to dicta in *United States v. Riverside Bayview Homes, Inc.*[105] *Riverside Bayview* attempted to answer a question of statutory interpretation, namely "whether the Clean Water Act . . . authorizes the [Army] Corps [of Engineers] to require landowners to obtain permits from the Corps before discharging fill material into wetlands."[106] The Sixth Circuit, among other arguments, had asserted that the possibility of a taking argued for a narrow interpretation of the Clean Water Act.[107] The Supreme Court disagreed on numerous grounds, and partway through its discussion the Court added one ground that has occasioned much misunderstanding. It commented that

> [a] requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.[108]

Some courts have used the language "only when a permit is denied . . . can it be said that a taking has occurred" as if it made ripe-

105 474 U.S. 121, 123 (1985). Courts following *Riverside Bayview* tend to read the ripeness as rule of decision idea into other Supreme Court cases, notably into *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), and *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). *See, e.g.*, Boise Cascade v. United States, 296 F.3d 1339, 1351 (Fed. Cir. 2002), *discussed infra* Part VI.C. However, *Hodel* and *Williamson County* clearly stand for an uncontroversial proposition: a landowner cannot challenge a regulation without applying for a permit. They do not support the idea that if a permit is granted, all takings claims vanish. *See supra* Part III.B.

106 *Riverside Bayview*, 474 U.S. at 123.

107 *Id.* at 125.

108 *Id.* at 127.

ness into a rule of decision rather than of a way of giving contour to claims. Those courts ignore the reality that at the time the statement was made a very different takings universe obtained, such that *Riverside Bayview*'s statement was an accurate account of the non-formal application of ripeness. In 1980, before *First English* and *Lucas*, it was not yet clear that a less than total use ban could ever be a taking, especially if only temporary. *Riverside Bayview* relied on a since-superseded *Agins v. Tiburon* analysis, under which land use regulations only "took" if they "denie[d] an owner economically viable use of his land."[109] Until *Lucas*, however, it was not yet clear whether this meant that there was only a taking in the rare case of a complete loss of use, or whether it only meant that a complete loss of use would always be a taking. If the former, then even the worst permit requirement, imposing a long delay and enormous trouble, will still leave room for some economically viable use of the land, because "the very existence of a permit system implies that permission may be granted, leaving the landowner free to use property as desired."[110] Thus, in the time when *Agins v. Tiburon* was still a bright star in the regulatory takings universe, the *Riverside Bayview* language was arguably correct.[111] Since then, the *Penn Central* test has clearly expanded to include non-total use bans;[112] total loss of economically viable use is not necessary, and permit requirements are no longer noncompensable merely because some use might be left at the end of the process.

Not only partial regulations generally but temporary takings specifically seemed an oxymoron at the time of *Riverside Bayview*. The Court noted that "[w]e have not yet resolved the question whether compensation is a constitutionally mandated remedy for 'temporary regulatory takings.'"[113] In 1987, *First English* removed that particular doubt—temporary takings now warranted the *Penn Central* test. Thus, if *Riverside Bayview* did prohibit, per se, compensation for permit requirements and other planning delays, it did so because at that time there was no regulatory takings claim, and a takings claim could not

109 *Id.* at 126 (citing Agins v. Tiburon, 447 U.S. 255, 260 (1980)); *see also supra* notes 41–42 and accompanying text.

110 *Id.* at 127.

111 Those few cases that refer to a *Riverside Bayview* style rule (i.e., a granted permit means no takings claim) without citing *Riverside Bayview* are from the era of *Agins v. Tiburon*. *See, e.g.*, United States v. Byrd, 609 F.2d 1204, 1211 (2d Cir. 1979).

112 To give one example, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), held that denying an owner economically viable use of land is a categorical taking. The Court explained that this is the proposition that it meant to advance in *Agins v. Tiburon*. *Id.* at 1016. As the *Penn Central* test is not categorical, obviously something less than total deprivation can still be a taking.

113 *Riverside Bayview*, 474 U.S. at 129 n.6.

therefore ripen, until an agency had imposed a permanent use restriction. In any case, other evidence from the opinion suggests that the Court did not intend to erect such a rule.

Riverside Bayview probably did not intend to state a rule barring permits from being takings. First, the *Riverside Bayview* landowners had simply not applied for a permit and then subsequently found themselves caught in a lengthy, costly process that called for redress. In fact, they had not even applied for the permit at all. Thus, even in a post-*Agins* era, the landowners would not have had a ripe claim. As this Note argues, permit requirements are only takings claims when the landowner has applied for a permit and has received a final decision, because only then can the delay and burden of applying for a permit be known. Thus, the ruling and the facts of *Riverside Bayview* are compatible with permit requirements as potential takings, even if this particular language is not.

Furthermore, this particular language is dicta, that is, "statements in a judicial opinion that are not necessary to support the decision reached by the court."[114] *Riverside Bayview*, after all, is a case about statutory interpretation and not a case about regulatory takings. The Court's real reasoning is that only per se takings need influence statutory interpretation; as long as permit requirements are not per se regulatory takings it makes little difference to *Riverside Bayview*'s analysis whether permit requirements are never takings (as the language quoted above would tend to suggest) or merely *possible* takings weighed under *Penn Central* (as later language in the same opinion suggests). The Court makes this clear: "If neither the imposition of the permit requirement itself nor the denial of a permit *necessarily* constitute a taking, it follows that the Court of Appeals erred."[115] In other words, the result in *Riverside Bayview* is not logically tied to the view that permit requirements are *never* takings. The result is only tied to the view that permit requirements are not *always* takings, which is precisely the result that evaluating permits under an ad hoc test will generate.

The *Riverside Bayview* Court reiterated this same point later in the opinion. "[The Sixth Circuit's approach] is sensible where it appears that there is an identifiable class of cases in which application of a statute will *necessarily* constitute a taking. . . . this is not such a case: there is no identifiable set of instances in which mere application of the permit requirement will necessarily or even probably constitute a

114 Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2000 (1994).

115 *Riverside Bayview*, 474 U.S. at 129 n.6 (emphasis added).

taking."[116] But under the *Penn Central* test, permit requirements clearly do not necessarily or even probably constitute a taking. Thus, *Riverside Bayview* is consistent with permits as potential takings, especially when one considers that the takings discussion is incidental to the global issue and did not occupy the attention of the Court.[117] The so-called *Riverside Bayview* rule, which implies that permits are never takings, comes from dicta.[118] In the takings arena, *Riverside Bayview* thus stands for two uncontroversial propositions: first, that permits are not ripe takings until a final decision and, second, permits are not takings per se.

B. Lower Court Cases

A number of lower court cases have seized on the language that "only when a permit is denied . . . can it be said that a taking has occurred."[119] They treat this language as if it created a substantive rule that a takings claim could never be ripe if it involved a granted permit. Given this rule's dubious origin in *Riverside Bayview*, it is little wonder that cases relying on it have not been models of clarity in all respects. Nonetheless, these cases generally seem to fall into two classes. First are those in which a landowner has suffered a delay because of a permit requirement or some other planning device—the courts cite *Riverside Bayview* and dismiss the claim as perpetually unripe. Second, plaintiffs who have not filed for a permit claim that the permit requirement effects a taking. In these cases, the courts rightly find that the takings claim is unripe, although citing the same overbroad language that *Riverside Bayview* used.

Cases of the second class are by far the more frequent, though some are murky enough that they may belong in the first class.[120]

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116 *Id.* at 129 n.5 (emphasis added).

117 Riverside Bayview is cited just as much for its ruling on how potential takings should influence statutory interpretation. *See, e.g.*, Iowa Utilities Bd. v. F.C.C., 219 F.3d 744, 754 (2000).

118 This Note will not scrupulously insert a "so-called" when referring to the *Riverside Bayview* rule. Lack thereof should not be taken to indicate that the author has changed his mind.

119 *Riverside Bayview*, 474 U.S. at 127.

120 *See, e.g.*, Adams v. United States, 255 F.3d 787 (9th Cir. 2001) (requiring a landowner to seek a permit or special use authorization did not effect a taking where the landowner had not applied for the permit); Greenbrier v. United States 193 F.3d 1348, 1357 (Fed. Cir. 1999) (noting that, when beneficiaries of certain federal mortgage programs were not allowed to prepay without seeking authorization, the takings claim was not ripe until the beneficiaries had actually tried to seek the authorization); Howard W. Heck & Assocs., Inc. v. United States, 134 F.3d 1468 (Fed. Cir. 1998) (holding that a regulation was not a taking where the landowner failed to complete

Cases of the first class, though less numerous, are still fairly frequent. One example will suffice to show the defects of this class: the Federal Circuit's attempt to follow the so-called rule of *Riverside Bayview* in *Tabb Lakes, Ltd. v. United States.*[121] When the United States Army Corps of Engineers had mistakenly enjoined Tabb Lakes from developing a property, for a period of three years, Tabb Lakes countered with a temporary takings claim. The Court of Federal Claims gave summary judgment to the Army Corps of Engineers and the Court of Appeals upheld, noting that the three year injunction could not be a taking, as Tabb Lakes could have applied for permission to develop and, if that permission had been granted, they would have had no claim.[122] The court mistakenly relied on *Riverside Bayview* as support for this proposition: "As a matter of law, the possibility of a permit precludes the order itself from constituting a taking."[123] *Tabb Lakes* also referred to the *Agins* principle that "preliminary decisionmaking does not amount to a taking."[124] In the normal sense, the takings

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the permit process); Gilbert v. City of Cambridge, 932 F.2d 51, 56 (1st Cir. 1991) (holding a takings claim unripe because the landowners had neither applied for a permit nor used a state inverse condemnation procedure); Rybachek v. United States Envtl. Prot. Agency, 904 F.2d 1276, 1300 (9th Cir. 1990) (holding that a takings claim against a permit requirement was not ripe because the affected Alaskan placer miners had not shown effects on any particular property); United States v. Vogler, 859 F.2d 638, 642 (9th Cir. 1988) (noting that a regulation imposing a permit requirement is not a taking where the landowner steadfastly refuses to apply for a permit); United States v. Rivera Torres, 826 F.2d 151 (1st Cir. 1987) (holding that designation as a wetland was not a taking when the landowner could apply for a permit that would permit use but had failed to do so); United States v. Moseley, 761 F. Supp. 90 (E.D. Mo. 1991) (holding that an assertion of jurisdiction was not a taking because the landowners had not finished the permit process); Lakewood Assocs. v. United States, 45 Fed. Cl. 320, 332 (1999) (holding that a claim was unripe because the owner had prematurely abandoned attempts to get a permit); Conant v. United States, 12 Cl. Ct. 689, (1987) (rejecting a landowner's taking claim because he failed to file for a permit).

121 10 F.3d 796 (Fed. Cir. 1993). Other cases in this class include *Wyatt v. United States*, 271 F.3d 1090 (Fed. Cir. 2001) (holding that a ten year permit delay was not a taking; permit requirements are not takings unless the government needlessly delays acting); and *Dufau v. United States*, 22 Cl. Ct. 156 (1990) (holding that a mere permit requirement cannot be a taking unless it causes extraordinary delay and involves total loss of use). In a similar case, the landowners in *Robbins v. United States*, 40 Fed. Cl. 381 (1998), had not filed for a permit—they challenged the mere designation of their land as wetland—but were able to show a specific property loss as a result of the designation. Although the contours of the claim were known, the court persisted in finding that their claim was not ripe, citing *Riverside Bayview* as authority. *Id.* at 385.

122 *Tabb Lakes*, 10 F.3d at 800–01.

123 *Id.* at 801.

124 *Id.*

claim was ripe, as the agency was not in a position to take back or alter the three year ban. *Tabb Lakes* nevertheless held the claim unripe because it had ended without a formal process of permit-seeking and permit denial.

Tabb Lakes was flawed in another way. The Federal Circuit erred because it thought a delay (such as a permit requirement) of *any length of time* would automatically be a compensable taking if it were potentially a taking at all: "[To decide if there was a taking] we must give the same effect to the cease and desist order regardless of whether the order ultimately had a permanent effect or only one limited in time."[125] But under current jurisprudence, temporary takings would be analyzed under *Penn Central*, in which the outcome would be doubtful, whereas a permanent ban would automatically constitute a compensable taking under *Lucas*. The distinction matters, and *Tabb Lakes* is representative of how making a rule of *Riverside Bayview* has tended to corrupt other doctrines of regulatory takings.

Besides its dubious antecedents and rationality, the rule has also proved impractical to apply, and courts have had to modify it. Two of the leading Federal Circuit cases, *Tabb Lakes* and *Wyatt*, both chose to create an exception for "extraordinary delay,"[126] in an ungainly attempt to approximate at least some of the flexibility of *Penn Central* analysis. But this "extraordinary delay" proved a weak reed. In *Wyatt*, a ten year delay was not considered "extraordinary" because the underlying regulatory scheme was very complex;[127] in other words, long delays were ordinary under that particular scheme of regulation. In contrast, *Penn Central* analysis would have allowed the court to directly consider whether the burden of highly complex regulations may have been better borne by the general public. The so-called *Riverside Bayview* rule has proved unable to provide a measure of relief to those landowners in the toils of regulation.

The *Riverside Bayview* rule is an out-of-context misreading of superseded dicta. It has proved unworkable in practice. The web of the law is better for having *Tahoe-Sierra* threaded into it, and the *Riverside Bayview* rule threaded out.

125 *Id.* at 800.

126 *Id.* at 803; *see also Wyatt*, 271 F.3d at 1098. *Wyatt* indicated that proof of "extraordinary delay" would almost always be proof of bad faith. *Wyatt*, 271 F.3d at 1098.

127 *Wyatt*, 271 F.3d at 1097–99.

VI. *TAHOE-SIERRA*

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,[128] the Supreme Court's 2002 regulatory takings case, has ended any remaining doubt about permits as potential takings and should put to rest the formal ripeness rule that excludes them.

The case was primarily an attempt to test some of the more radical implications of *Lucas*. *Lucas* affirmed that a total and permanent ban on the use of a property was per se or categorically a taking. But how to define property? The Supreme Court had heretofore used the "whole parcel" rule, which includes all the uses of all of the portions of a plot, along with all the future uses. *Lucas*, however, suggested that property might mean "interests in land" or "estates" that had a "rich tradition of protection at common law."[129] As terms of years, leaseholds, and other temporary but otherwise complete ownership interests do indeed have a long tradition at the common law, some speculated that total but temporary prohibitions on all use were also per se takings under *Lucas*. *Tahoe-Sierra* tested that possibility. As the temporary delay at issue was a moratorium on construction—a common planning device—the Supreme Court had an opportunity to clarify the proper rule for other planning devices, like permits, that also cause temporary delays.

A. Legal and Factual Background

Tahoe-Sierra addressed a dispute between numerous landowners (the Tahoe-Sierra Preservation Council) and the Tahoe Regional Planning Agency. Dedicated to conserving the legendary clarity of Lake Tahoe's waters, the agency had imposed a temporary moratorium on further development and then indefinitely renewed the moratorium.[130] The landowners took to the courts and claimed that they had suffered a taking for the duration of the combined moratoria (a period of some three years).[131] The district court applied two different takings tests: the categorical takings rule announced in *Lucas*, and the ad hoc test usually associated with *Penn Central*. The district court ruled that a total prohibition of development for a period of time

128 535 U.S. 302 (2002).

129 Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7 (1992).

130 *Tahoe-Sierra*, 535 U.S. at 306–08.

131 Although the moratoria only deprived the landowners of three years' use, injunctions, delays, and the permit process imposed after the moratoria have prevented some uses up to this day. *See* Michael Berger, Tahoe-Sierra, *Much Ado About-What?* 25 U. HAW. L. REV. 295, 296–300 (2003).

brought the landowners' claim under the sheltering wing of *Lucas*.[132] But if not for *Lucas*, they would have been out of luck: the district court ruled that the *Penn Central* factors would have resulted in the opposite decision.[133]

The Court of Appeals for the Ninth Circuit overruled, the judges of that court correctly reasoning that the Supreme Court and lower courts have indicated that most regulatory takings cases should be resolved by the *Penn Central* test balancing the public and private interests at stake, with three primary factors weighing in the balance: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.[134]

But the Ninth Circuit saw that the district court had disposed of the *Penn Central* claim, so it turned it's attention to the *Lucas* claim,[135] which it rejected because the moratorium only took all present use of the land, holding out hope for the future.[136] That is, the moratorium did not take all uses because the future uses were left. The Ninth Circuit even (incorrectly, as it turns out) went so far as to suggest that moratoria and permit requirements might categorically never be takings by noting that the Supreme Court's discussion of planning in *First English* "suggests that planning activities that temporarily prohibit development do not constitute takings."[137] In any case, the Ninth Circuit deferred to the lower court judgment that the three year moratoria were not regulatory taking under the *Penn Central* test.[138]

B. Ruling

The Supreme Court granted certiorari, the Justices in the majority viewing the issues as whether a "moratorium on development . . . constitutes a *per* se taking of property."[139] The Court held that it did not.[140] Like the district court and the court of appeals, the Supreme

132 Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 34 F. Supp. 2d 1226, 1242–43 (D. Nev. 1999) (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)).

133 *Id.* at 1240–42.

134 Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 216 F.3d 764, 772 (9th Cir. 2000).

135 *Id.* at 773.

136 *Id.* at 782.

137 *Id.* at 778 n.17.

138 *Id.* at 782.

139 Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 306 (2002).

140 *Id.* at 321.

Court distinguished two takings regimes: a per se regime, such as that found in *Lucas*, and an ad hoc regime, described in *Penn Central*.[141] The Court concluded that moratoria were not takings per se but rejected the argument mentioned by the Ninth Circuit[142] and by the respondent[143] that moratoria, permit requirements, and other land use regulations in aid of government decisionmaking never were takings. "In our view the answer to the abstract question whether a temporary moratorium effects a taking is neither 'yes, always' nor 'no, never.'"[144] The Court resisted "[t]he temptation to adopt what amount to *per se* rules in either direction."[145] Instead, the Supreme Court thought that the moratoria would best be adjudicated by "relying on the familiar *Penn Central* approach."[146] The Court was fully aware that using a *Penn Central* approach implied that some planning moratoria would require compensation. "It may be true," the Court admitted, "that under a *Penn Central* analysis petitioners' land was taken and compensation would be due."[147] Of course, the district court had already applied the *Penn Central* analysis, and the petitioners had failed to appeal, relieving the Supreme Court of any further need to consider a possible *Penn Central* taking. But the ruling remained: moratoria are or are not takings based on the unique facts of each case as filtered through the *Penn Central* factors. Or, as the Supreme Court would have it: "We conclude, therefore, that the interest in 'fairness and justice' will be best served by relying on the familiar *Penn Central* approach when deciding cases like this."[148] Moratoria always present a takings claim, but will have to be evaluated using the *Penn Central* factors to decide whether they are actually takings or not.

So the Supreme Court put (potential) fear and trembling into moratoriators everywhere. It also served notice that permit requirements and other planning delays could be takings. The Court in *Tahoe-Sierra* reached its result by equating moratoria with permit and other planning delays, and then applying to moratoria the rule that to the Court seemed appropriate for permit requirements. In other words, *Tahoe-Sierra* ruled that moratoria should be considered under a *Penn Central* analysis because moratoria are like permit requirements, and *permit requirements are to be evaluated under a* Penn Central *test.*

141 *Id.* at 321–25.
142 *See supra* note 137 and accompanying text.
143 *See infra* note 178 and accompanying text.
144 *Tahoe-Sierra*, 535 U.S. at 321.
145 *Id.*
146 *Id.* at 342.
147 *Id.* at 321 n.16.
148 *Id.* at 342.

The Court rejected a per se rule for moratoria explicitly because any such rule would necessarily become a per se rule for permits or other devices. "[T]he extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking surely cannot be sustained. Petitioners' broad submission would apply to numerous 'normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like.'"[149] Moratoria cannot always be takings because then most permit requirements would automatically be takings. Moratoria and permit requirements are conflated. Moratoria are just another planning tool.

Perhaps recognizing the similarity between permits and moratoria, the petitioners (the landowners) used both their brief and oral arguments to try to distinguish them. In their brief, they argued that *First English* distinguished between permit requirements and moratoria. *First English* made this distinction, they argued, because permits, variances, and other devices are all "a process in which a landowner is participating with the expectation—or at least the possibility—of obtaining development permission at the conclusion."[150] In contrast, the petitioners argued, moratoria are "total development freeze[s]."[151] The petitioners tried to make the same distinction, at rather more length, in oral arguments. They told the court that a permit requirement "is a process leading toward development. [A moratorium] is a process of total blockage."[152] The Court found this distinction difficult, so the petitioners ended up spending the bulk of their oral argument time trying to explain.[153]

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149 *Id.* at 334–35 (citing First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321 (1987)).

150 Petitioner's Brief at 28, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) (No. 00-1167).

151 *Id.*

152 Michael Berger, Oral Argument, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) (No. 00-1167).

153 *Id.* The following exchange is typical:

> QUESTION: What do you do about the fact that there is a regulatory taking of sorts whenever you have a permit system, let's say the normal zoning regime in which you cannot construct any building on your acreage without first applying and getting the approval of the zoning agency?
>
> MR. BERGER: Justice Scalia—
>
> QUESTION: During that period, there's been a total taking. You cannot do anything with that property until you get the building approved.
>
> MR. BERGER: Clearly you cannot do anything until you've gotten the property approved, but it seems to me that there is a fundamental difference between a landowner working through a system whose end product is, at least theoretically and probably very likely, the issuance of a permit to go

Perhaps because of the petitioners' urging, *Tahoe-Sierra* did briefly entertain the idea of treating moratoria and permits differently. The Court "could craft a narrower rule that would cover all temporary land-use restrictions except those 'normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like,'"[154] but in rejecting this "narrower rule," the Supreme Court clearly conflates permit delay with moratoria. The "petitioners fail to offer a persuasive explanation for why moratoria should be treated differently from ordinary permit delays. . . . [P]etitioners' argument breaks down under closer examination."[155]

In *Tahoe-Sierra*, the Court ends any remaining uncertainty about permits as potential takings. The Court first concluded that moratoria delays are indistinguishable from the delays attendant on seeking a permit, a variance, or other planning device. It then stated that *Penn Central* is the correct takings regime for permit delays. Since permits were equivalent to moratoria, the Court then held that moratoria are also to be treated under a *Penn Central* analysis. Regulatory delays, whether moratoria or a request for a variance or a permit process, are to be evaluated as possible takings under a fact-specific, ad hoc test.

As if to remove any remaining doubt, *Tahoe-Sierra* was careful to refer to "ordinary permit delays"[156] as potential takings in contrast to *Tabb Lakes*'s and *Wyatt*'s "extraordinary delays." *Tahoe-Sierra* puts to rest any notion that permits cannot be takings, and any remaining misconception of *Riverside Bayview*.

C. *Post*-Tahoe-Sierra: Boise Cascade

One Federal Circuit case has attempted to defend the so-called *Riverside Bayview* rule against *Tahoe-Sierra*.[157] The paltry defense only serves to underscore the vigor of *Tahoe-Sierra*'s inclusion of permits.

Boise Cascade Corporation owned a 65-acre wood, which they wished to log. The U.S. Fish and Wildlife Service wished to use that wood for another purpose—breeding habitat for spotting owls. After

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ahead and develop something that is economically productive on that land as opposed to being stuck in a system where you're forbidden—

QUESTION: But that would have been during that interval of time it meets your test. Nothing can be done until the permit issues, so a fortiori, under your theory, compensation due.

MR. BERGER: I don't believe so, Justice O'Connor, because—

QUESTION: Well, that's what it sounds like.

154 *Tahoe-Sierra*, 535 U.S. at 333.

155 *Id.* at 338 n.31.

156 *Id.*

157 Boise Cascade Corp. v. United States, 296 F.3d 1339 (Fed. Cir. 2002).

three years of permit applications, injunctions, and counterclaims (lucrative, no doubt, for some legal practitioner), the resident spotted owl took matters into its own hands and died. The U.S. Fish and Wildlife Service promptly released Boise Cascade from any obligation to get a permit before logging, and, a three year takings claim now being ripe, Boise Cascade promptly sued, "seeking just compensation for the 'temporary taking of merchantable timber, which it was prevented from logging.'"[158] The government countered that a three year delay, if caused by a permit requirement, "did not constitute a taking as a matter of law under *United States v. Riverside Bayview Homes, Inc.*"[159] The Federal Circuit accepted this theory, and in so doing rejected *Tahoe-Sierra*'s rule.

The *Boise Cascade* court attempted to explain away *Tahoe-Sierra* on two grounds: first, that permit requirements are not really like moratoria;[160] and second, that the Supreme Court would not eliminate an important doctrine like that of ripeness as rule of decision without explicitly mentioning the doctrine.[161] The first ground is directly contradicted by *Tahoe-Sierra* itself. The second ground rests on false assumptions.

Boise Cascade does not succeed in trying to undo *Tahoe-Sierra*'s conflation of moratoria and other planning delays. The appellate court admitted that "[t]he [Supreme] Court explicitly analogized the temporary moratoria . . . to permitting delay cases."[162] The court also admitted that *Tahoe-Sierra*'s footnote 31 establishes that "temporary moratoria should be treated like permitting delay[s]."[163] But it adds, "This does not affect that longstanding rule that . . . only *extraordinary* delays in the permitting process ripen into a compensable taking. Whether a particular *extraordinary* delay constitutes a taking is governed by *Penn Central*, just as are temporary moratoria."[164] *Boise Cascade* tried to recast *Tahoe-Sierra* as equating moratoria and extraordinary permit delays, but *Tahoe-Sierra* actually says "moratoria should be treated [like] *ordinary* permit delays."[165]

While admitting that the Supreme Court "explicitly analogized the temporary moratoria at issue in *Tahoe* to permitting delay

158 *Id.* at 1342.
159 *Id.* at 1343.
160 *Id.* at 1350–51.
161 *Id.* at 1351.
162 *Id.* at 1350.
163 *Id.*
164 *Id.* at 1352 (emphasis added).
165 Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 338 (2002).

cases,"[166] the Federal Circuit thought a difference could still be found—moratoria are not like permit requirements because "the moratoria admit[ted] no exceptions, whereas permits can be granted and variances allowed."[167] The *Tahoe-Sierra* landowners made the same argument: they repeatedly urged the Court to distinguish permit requirements on the grounds that permit requirements envision granted permits, whereas moratoria do not.[168] *Tahoe-Sierra's* reply devastated the landowners and devastates *Boise Cascade.* "[P]etitioners' argument breaks down under closer examination because there is no guarantee that a permit will be granted, or that a decision will be made. . . . [Moreover, an agency might] simply delay[ ] action on all permits."[169] In other words, as long as a permit is still pending, the regulation puts a chokehold on land use just as a moratorium would. If a permit is granted in two years, a two year "moratorium" has just been lifted. If the permit is denied after two years, a two year "moratorium" has just been made permanent. Permit delays and moratoria conflate, which is why *Tahoe-Sierra* explicitly and repeatedly analogized "ordinary permit delays" to moratoria for the purposes of takings analysis. The absurdity—the near lawlessness even—of *Boise Cascade*'s attempt to explain away *Tahoe-Sierra* shows how fully and completely *Tahoe-Sierra* addressed permit requirements.

The Federal Circuit also argued that the Court would not overturn an important rule like the *Riverside Bayview* rule without so stating explicitly, let alone doing it with a few throwaway lines. "*Tahoe,*" the Federal Circuit argued, "did not explicitly overrule, or even dis-

166 *Boise Cascade,* 296 F.3d at 1350.

167 *Id.* at 1352.

168 *See supra* notes 150–53 and accompanying text. The following exchange from oral argument highlights the identical content of Boise Cascade's and the petitioners' argument:

> QUESTION: But you still have—I mean, in the one case the regulating agency has said, you can't do anything with your land while we're thinking about the scheme we're going to adopt, and in the other case the agency has said, just as categorically, you can't do anything with your land while we consider your application. In both cases they're, for a later regulatory purpose they're both saying, you can't do anything with your land.
>
> MR. BERGER: Justice Scalia, in a sense that is certainly true, but in the case of the processing of a permit application, we know that there is permitted use. It's there. It's in the books.
>
> QUESTION: Not during the pendency. Not while the application is pending.

Michael Berger, Oral Argument, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) (No. 00-1167).

169 *Tahoe-Sierra,* 535 U.S. at 338.

cuss, the ripeness rule articulated in *Riverside Bayview*."[170] The Federal Circuit continued, "Boise argues, in essence, that the Court overruled *Riverside Bayview* sub silentio in footnote 31 of its opinion in *Tahoe*."[171] But this simply will not do. *Tahoe-Sierra* did not merely mention permit delays in one obscure footnote—the comparison permeates the case. It provides the grounds for the decision.[172] Furthermore, *Tahoe-Sierra* overturned nothing. Ripeness has always been about discovering the contours of a claim and nothing more.[173] The *Riverside Bayview* rule came not from the case but from a lower court misreading.[174]

Finally, the *Tahoe-Sierra* Court had before it a correct understanding of *Riverside Bayview*.[175] That nuanced view, propounded by both the respondent and by the Solicitor General's amicus brief, sees *Riverside Bayview* as merely standing for the proposition that a permit does not effect a categorical taking. The Solicitor General's brief, for instance, brings in *Riverside Bayview* because it holds that "a temporary bar on development for the duration of the permitting process leaves open the potential for future productive uses and is therefore exceedingly unlikely to eliminate the property's value, even on a temporary basis."[176] Elimination of property value is, of course, a key component of the *Lucas* categorical test. The Solicitor General is merely (and correctly) suggesting that *Riverside Bayview* does not classify permit requirements as categorical takings.

Likewise, the *Tahoe-Sierra* respondent used *Riverside Bayview* to make an uncontroversial point about the requirements of ripeness. Its brief cited *Riverside Bayview* to support the proposition that "[u]ntil the planning process is complete, and the range of future uses established, it cannot be said that an agency has opted to prohibit all use of affected properties."[177] These more nuanced views accurately portray the whole of the *Riverside Bayview* opinion. As the Court had these more nuanced and correct views available to it, it should in no way have felt obligated to "overturn" *Riverside Bayview*.

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170 *Boise Cascade*, 296 F.3d at 1351.

171 *Id.*

172 *See supra* Part VI.B.

173 *See supra* Part VI.B.

174 *See supra* Part V.A.

175 This understanding is described *supra* Part V.A.

176 Amicus Curia Brief for the United States at 13, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) (No. 00-1167).

177 Respondent's Brief at 26–27, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) (No. 00-1167) (citing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985)).

Further, the *Tahoe-Sierra* Court was fully aware of the so-called *Riverside Bayview* rule. In another section of the brief, the respondent tried to argue that permit requirements and moratoria are categorically *never* takings. The respondent referred to the

> Court's determination in *Riverside Bayview Homes* . . . that the requirement that a property owner obtain a permit "before engaging in a certain use of his or her property does not itself 'take' the property in any sense." Implicit in such a finding, of course, is the premise that the process necessary to obtain a permit does not itself result in a taking.[178]

When the *Tahoe-Sierra* Court stated that permits were potential takings under *Penn Central*, it was not unaware of the argument allegedly in *Riverside Bayview* that permits could never be takings. A court cannot legitimately claim that the *Tahoe-Sierra* treatment of permit requirements and other planning regulations is illegitimate because *Tahoe-Sierra* was unaware of an alternative interpretation of *Riverside Bayview*.

We have already seen that *Riverside Bayview* does not contradict *Tahoe-Sierra*'s clear holding that permitting requirements can be takings. The respondent's and amicus' briefs made this clear to the Court. But if there was any contradiction between *Tahoe-Sierra* and some interpretations of *Riverside Bayview*, we cannot say that the Supreme Court was ignorant of the consequences of their ruling. The respondent forthrightly referred to *Riverside Bayview* as a categorical rule against permit requirements as takings. If the respondent's (and *Boise-Cascade*'s) theory of *Riverside Bayview* is correct, *Tahoe-Sierra* has overruled it.

Boise-Cascade's attempt to salvage its interpretation of *Riverside Bayview* failed. Moratoria cannot be distinguished from permit requirements; permit requirements cannot be distinguished from other regulatory takings. *Tahoe-Sierra* has ended the ripeness misunderstanding that led some lower courts to try to do so.

CONCLUSION

Tahoe-Sierra has taken a decisive step in a long line of development. Permit requirements and other planning delays are clearly now potential takings under *Penn Central*, just like any other land use regulation. While many of these claims will not prevail—most permit requirements do not in fact impose an onerous burden—landowners now have a measure of relief from the enormous power of the regula-

178 Respondent's Brief at 33–34, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) (No. 00-1167).

tors that grant the permits. If nothing else, a landowner can always take to the courts seeking compensation for whatever delay has already happened, thus imposing the stick of a lawsuit on the recalcitrant regulators who are in turn imposing costs on the landowner.

Although *Tahoe-Sierra* has taken a major step, some things yet need to be done. The Supreme Court will probably have to reaffirm *Tahoe-Sierra* before the Federal Circuit and other lower courts will finally agree that it means what it says. More interesting, the Supreme Court will have to develop a doctrine of comparative fault, to apportion permit delays between the permit regulation and the landowner. The courts will have to ask what proportion of the temporary loss of use was inherent in the permit regulation and agency consideration, and what was due to the landowner's unreasonable dilatoriness in applying or responding to requests. The Supreme Court will also need to develop a doctrine of joint and several liability. In a world of overlapping regulations, only thus can governments fairly share the costs between them. Only in this way can the courts prevent agencies from cooperating to tie up permits.

In these ways, the journey that *Tahoe-Sierra* has so helped along will be well ended. Those caught in the toils will have a measure of relief.